

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2014-000068-001 DT

04/25/2014

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT

J. Eaton

Deputy

STATE OF ARIZONA

WEBSTER CRAIG JONES

v.

NATHAN FALAH NAJOR (001)

CRAIG JACOB ROSENSTEIN

MESA MUNICIPAL COURT - COURT
ADMINISTRATOR

MESA MUNICIPAL COURT -
PRESIDING JUDGE

REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case No. 2013–011176.

Defendant-Appellant Nathan Falah Najor (Defendant) was convicted in Mesa Municipal Court of DUI (drug or its metabolite in person's body). Defendant contends the trial court erred in precluding evidence at trial of his Arizona-issued medical marijuana card as a defense. For the reasons stated below, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND

On February 27, 2013, the State filed a long-form complaint against Defendant alleging that, on July 3, 2012, Defendant violated A.R.S. § 28–1381(A)(1) (DUI—impaired to the slightest degree), and 28–1381(A)(3) (DUI—drug or its metabolite in person's body). Notably, blood tests revealed THC, and THC metabolites, non-impairing metabolite carboxy-THC, and impairing metabolite hydroxy-THC, in Defendant's body. Defendant filed a Motion *in limine* to allow him to introduce evidence of the medical marijuana card at trial; the State filed a response asking the trial court to deny Defendant's request. On September 19, 2013, an oral argument was held, after which the trial court issued an order denying Defendant's motion. The trial court ruled that it would preclude Defendant from presenting evidence of a medical marijuana certificate as a defense to the A.R.S. § 28–1381(A)(3) charge, as it had no application to that charge. However, the

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trial court found that, while A.R.S. § 36–2802(D)¹ might be relevant in a prosecution for a violation of A.R.S. § 28–1381(A)(1), it had no application to 28–1381(A)(3). The trial court also found that a medical marijuana certificate is not a prescription pursuant to A.R.S. § 28–1381(D).² On the September 23, 2013, jury trial date, the State moved to dismiss the A.R.S. § 28–1381(A)(1) charge without prejudice, which the trial court granted. Defendant then submitted the issue of his guilt or innocence to the court based on a stipulated record. Defendant was found guilty of violating A.R.S. § 28–1381(A)(3) and sentenced on that same day. On September 30, 2013, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES:

A. Whether Defendant Should Have Been Allowed To Present Evidence of His Medical Marijuana Card as a Defense to A.R.S. § 28–1381(A)(3) under A.R.S. § 28–1381(D).

A.R.S. § 28–1381(A)(3) makes it unlawful for a person to drive or be in actual physical control of a vehicle in this state while there is any drug defined in A.R.S. § 13–3401³ or its metabolite in the person's body. Notably, on April 22, 2014, the Arizona Supreme Court held:

Because the legislature intended to prevent impaired driving, we hold that the “metabolite” reference in § 28–1381(A)(3) is limited to any of a proscribed substance’s metabolites that are capable of causing impairment.⁴ Accordingly, marijuana users violate § 28–1381(A)(1) if they drive while “impaired to the slightest degree,” and, regardless of impairment, violate (A)(3) if they are discovered with any amount of THC or an impairing metabolite in their body. Drivers cannot be convicted of the (A)(3) offense based merely on the presence of a non-impairing metabolite that may reflect the prior usage of marijuana.

State ex rel. Montgomery v. Harris (Shilgevorkyan), 2014 WL 1593062, ¶ 24 (Ariz. Apr. 22, 2014). Thus in a prosecution for A.R.S. § 28–1381(A)(3), the non-impairing metabolite Carboxy-THC does not apply. A.R.S. § 28–1381(D) states that a person using a drug as *prescribed* by a licensed medical practitioner is not guilty of violating A.R.S. § 28–1381(A)(3). The Arizona Medical Marijuana Act (“AMMA”) was added by 2010 Prop. 203 (an initiative measure), approved by the voters at the November 2, 2010, general election, and became effective on Decem-

¹ A.R.S. § 36–2802(D) simply provides that a driver who is a registered, qualifying patient (for whom a physician recommended medicinal marijuana), “shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment.” Clearly, this precludes an erroneous presumption about the presence of marijuana metabolites and a driver being “under the influence.”

² A.R.S. § 28–1381(D) provides as follows:

A person using a drug as prescribed by a medical practitioner licensed pursuant to title 32, chapter 7, 11, 13 or 171 is not guilty of violating subsection A, paragraph 3 of this section.

³ Cannabis (also known as “marijuana”) is a drug listed in A.R.S. § 13–3401.

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ber 14, 2010. Codified, the AMMA consists of §§ 36–2801 to 36–2819. The AMMA does not give authority for marijuana to be prescribed, and it may not be prescribed under federal law because it is a Schedule I drug pursuant to the Controlled Substances Act. Opinions of the Attorney General are advisory and are not binding. However, reasoned opinions of the state Attorney General should be accorded respectful consideration. *Ruiz v. Hull*, 191 Ariz. 441, 957 P.2d 984, ¶ 28 (1998). Notably, in *Ariz. Op. Att’y Gen. No. 111-004* (July 7, 2011), it states, in pertinent part:

In particular, medical marijuana sales proceeds do not constitute tax-exempt proceeds of income derived from the sale of prescription drugs under A.R.S. § 42–5061(8), because the Act does not contemplate prescriptions for medical marijuana. Instead, an individual applying for a registry identification card from the Arizona Department of Health Services must submit “written certification” from a physician specifying the patient's debilitating medical condition and stating that in the physician's professional opinion, the patient is likely to benefit from the medical use of marijuana. A.R.S. § 36–2801(18). Medical marijuana is not “prescribed” by a physician under these circumstances because the physician is not directing the patient to use marijuana. Moreover, in contrast to the fact pattern under which a physician writes a prescription that is delivered to a pharmacy, medical marijuana certification is submitted to the Arizona Department of Health Services, rather than to an organization that dispenses medical marijuana.

The fact that licensed physicians are prohibited under federal law from prescribing “Schedule I” controlled substances (as defined in § 812 of the Controlled Substances Act), including marijuana, further supports the conclusion that medical marijuana certification submitted to the Arizona Department of Health Services does not amount to a “prescription” for purposes of the prescription drug exemption established under A.R.S. § 42–5061(8).

This Court concurs. Marijuana may not be *prescribed* in Arizona. Accordingly, A.R.S. § 28–1381(D) does not apply to situations involving marijuana, and certainly does not provide a “safe harbor” for those who ingest marijuana and then drive or be in actual physical control of a vehicle in this state. Consequently, the holder of a valid medical marijuana card may not drive or be in actual physical control of a vehicle in this state while there is marijuana or its impairing metabolite in the person’s body. Having a valid medical marijuana card is not a defense for A.R.S. § 28–1381(A)(3). The trial court did not err when it precluded Defendant from presenting evidence of his medical marijuana card.

B. Whether a Medical Marijuana Card is Relevant in an A.R.S. § 28–1381(A)(1) Charge.

Because the trial court dismissed the A.R.S. § 28–1381(A)(1) charge, this issue is moot.

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III. CONCLUSION

Based on the foregoing, this Court concludes the trial court did not err when it precluded Defendant from presenting evidence of his medical marijuana card.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Mesa Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Mesa Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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